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Class Certification: Will Gorsuch Pick Up Where Scalia Left Off?

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For two decades leading up to Justice Antonin Scalia's death, the U.S. Supreme Court's class certification jurisprudence took shape as a dialogue between Justices Scalia and Ruth Bader Ginsburg over the commonality and predominance requirements of Federal Rule of Civil Procedure 23(a)(2) and (b)(3), respectively. In broad strokes, Ginsburg favored granting significant discretion to district judges to determine whether, based on the unique facts and pragmatic concerns of each case, a class action was the appropriate vehicle for resolution. By contrast, Scalia favored requiring putative class plaintiffs to meet an ever-increasing set of "bright line" rules in order to have a class certified. Fundamentally, this debate reflected their views on the desirability of class actions as a means of dispute resolution.

With Scalia's passing, the court has hinted that it will embrace Ginsburg's pragmatic approach in future cases. But, as discussed below, a surprisingly few clues indicate whether President Trump's nominee to replace Scalia, Judge Neil Gorsuch of the U.S. Circuit Court of Appeals for the Tenth Circuit, will follow in Scalia's footsteps in this area.

Ginsburg's Pragmatism

Since its inception in 1938 and critical revisions in 1966, FRCP 23 has set forth the requirements for class certification. Among the most significant of these requirements, "commonality" requires that there be "questions of law or fact common to the class" and applies to all class actions. FRCP 23(a)(2). To be certified under Rule 23(b)(3), a putative class plaintiff must further show that those questions of law or fact common to the class "predominate over any questions affecting only individual members." FRCP 23(b)(3).

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In her first major opinion on predominance for the court's majority, *Amchem Products v. Windsor*, 521 U.S. 591, 594 (1997), Ginsburg held that district judges should assess whether the proposed class was "sufficiently cohesive" to warrant certification under Rule 23(b)(3). The court affirmed the U.S Court of Appeals for the Third Circuit's reversal of the district court's

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certification of a massive settlement class that would have resolved hundreds of thousands of present and future tort claims against asbestos manufacturers. In ruling that such a class was not sufficiently "cohesive," Ginsburg found that the plaintiffs "were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods." Id. at 609. Although the majority found the district court's basis for certification insufficient given the extraordinarily complex array of claims involved, Ginsburg's opinion reaffirmed the substantial discretion lower courts could exercise in making such an assessment. Indeed, the "cohesiveness" test could not be considered a "bright line" by any measure.

Scalia's Heightened Rule

In *Wal-Mart Stores v. Dukes*, 564 U.S. 338, 343 (2011), a putative class of 1.5 million current and former employees of Wal-Mart brought a Title VII claim alleging gender discrimination in pay and promotions. In support of commonality, the plaintiffs relied in large part on representative evidence of disparate impact at the aggregate regional and national levels. Id. at 356. In the majority opinion, Scalia rejected this "Trial by Formula" approach for several reasons. Id. at 367. First, given that Wal-Mart's policy was to give discretion to store managers in allocating promotions, regional and national statistics did not establish that individual store managers exercised this discretion improperly or in the same manner. Id. at 355-56. Thus, plaintiffs failed to show that they suffered the same type of injury under Title VII, whether intentional discrimination or a uniform pay and promotion policy that resulted in a disparate impact. Id. at 349-50. Second, the use of representative evidence to satisfy certification requirements would violate Wal-Mart's right to litigate its defenses to individual claims as it was entitled to do under the burden-shifting framework of Title VII. Id. at 367. In essence, Scalia newly established a rule that, as part of the "rigorous analysis" conducted at the certification stage, the putative plaintiffs present proof of common answers across the proposed class, and not just common questions of law or fact. Id. at 350-51. By contrast, Ginsburg wrote in partial dissent that the district court acted within its discretion in reviewing the available statistical or representative evidence—in light of human nature—and finding an inference of discrimination sufficient to satisfy the commonality requirement. Id. at 371-72.

Impact of 'Wal-Mart' Forestalled

Two years later, in *Amgen v. Connecticut Retirement Plans & Trust Funds*, Ginsburg attempted to cabin the impact of *Wal-Mart* from spreading into the predominance inquiry under 23(b)(3). See 133 S.Ct. 1184 (2013). The putative plaintiff class in *Amgen* consisted of investors alleging securities fraud by invoking the fraud-on-the-market theory under *Basic v. Levinson*. Id. at 1188. Writing for the majority affirming certification, Ginsburg held that proof of materiality common to all members of the class is not a prerequisite to certification. Id. at 1188-89. Rather, the mere fact that materiality is susceptible to common proof—since it is judged according to an objective "reasonable investor" standard—is a strong indicator that common issues predominate, regardless of whether such proof is ultimately favorable to the plaintiffs. Id. at 1191, 1195. In dissent, Scalia argued that classwide proof of materiality is required at the class certification stage under *Basic*; otherwise all market-purchase and market-sale class actions would be certified regardless of the precise nature of the alleged misrepresentation. Id. at 1205-06. By asserting that district courts must evaluate the merits of plaintiff's fraud-on-the-market proof when evaluating predominance, Scalia attempted unsuccessfully to impose a higher burden on plaintiffs at the certification stage.

Scalia's Final Effort

Within months of *Amgen*, Scalia issued the majority opinion in

Comcast v. Behrend, 133 S. Ct. 1426 (2013), which involved a putative class of customers alleging anticompetitive conduct by Comcast. The district court certified the class based upon a damages model submitted by the putative plaintiffs' expert that calculated damages attributable to four different theories of antitrust injury. Id. at 1430-32. But the court simultaneously ruled that only one of the four theories would be cognizable as a basis for such damages. Id. The Third Circuit affirmed. Id. at 1431. Reversing the lower courts, Scalia held that the mismatch between plaintiffs' court-approved injury theory and its damages analysis meant that the latter did not "measure only those damages attributable" to the accepted theory. Id. at 1433. Thus, plaintiffs' damages "model f[ell] far short of establishing that damages [were] capable of measurement on a classwide basis," and "[q]uestions of individual damage calculations … inevitably overwhelm[ed] questions common to the class." Id. The plain text of Scalia's majority opinion heightened the predominance requirement significantly to require that damages be susceptible to classwide proof in class actions, and that such proof be presented at the class certification stage rather than merely at trial or on summary judgment.

In dissent, Ginsburg retorted that the predominance requirement "scarcely demands commonality as to all questions." Id. at 1436. In particular, "when adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate." Id. at 1437. Once again, these two justices articulated very different conceptions of both the putative plaintiff's burden at class certification and the trial court's discretion to certify a class even absent a full evidentiary showing of uniform proof common to the class. Most lower courts, including those in this circuit, have since read *Comcast* much as Ginsburg did by simply requiring a congruity between a putative plaintiff's theory of liability or injury and its damages analysis.[1]

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Ginsburg Garners a Majority

Shortly after Scalia passed away, the court embraced Ginsburg's pragmatic approach to a district court's discretion to consider "representative" and statistical evidence to demonstrate predominance. In *Tyson Foods v. Bouaphakeo*, 136 S.Ct. 1036, 1039 (2016), a plaintiff class of workers at a pork processing plant brought an action alleging that Tyson violated state law and the Fair Labor Standards Act (FLSA) by failing to compensate employees for time spent "donning and doffing" protective equipment. In order to prove damages, plaintiffs relied on an expert analysis of the average time a representative sample of the workers spent donning and doffing. Id. at 1043. Rejecting the "bright line" rules of *Wal-Mart* and *Comcast*, Justice Anthony Kennedy wrote for the majority that "[w]hether and when statistical evidence can be used to establish classwide liability will depend on the purpose for which the evidence is being introduced and on 'the elements of the underlying cause of action … .'" Id. at 1040. Where Tyson had violated its statutory duty to maintain proper records of time worked by employees, and in light of the remedial nature of the FLSA, Kennedy held that representative evidence could properly be used to satisfy the predominance requirement. Id. at 1047-48. In fact, Kennedy clarified that "*Wal-Mart* does not stand for the broad proposition that a representative sample is an impermissible means of establishing classwide

liability." Id. at 1048. Echoing Ginsburg, Kennedy further stated that the relevance of any evidence to predominance is contextual, and an "action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." Id. at 1045. Without Scalia on the court, the era of heightened "bright line" evidentiary hurdles facing putative plaintiffs at class certification appeared briefly to have ended.

Certification Under Gorsuch?

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The only class action certification case in which Judge Gorsuch authored the court's majority opinion involved a putative class of county jail inmates suing for injunctive relief for alleged Eighth Amendment violations. See *Shook v. Bd. of Cty. Commissioners of Cty. of El Paso*, 543 F.3d 597 (10th Cir. 2008) (Gorsuch, J.). In *Shook*, Gorsuch affirmed the denial of class certification on the basis that the class was not susceptible as a whole to uniform injunctive relief as required by Rule 23(b)(2) because "the class members' injuries must be sufficiently similar that they can be addressed in an single injunction that need not differentiate between class members." Id. at 604. Rule 23(b)(2)'s requirements are distinct from those of commonality and predominance in Rule 23(a) and (b)(3). Gorsuch did emphasize in *Shook* the importance of the discretion afforded to district courts in reaching class certification decisions, but it would be speculation to read much into such verbiage outside of the specific context of predominance or commonality. Id. at 603. At most, *Shook* suggests that Gorsuch would take seriously the certification requirements of Rule 23.

As a practicing attorney in 2005, Gorsuch complained in an article on securities fraud cases that "economic incentives unique to securities litigation encourage class action lawyers to bring meritless claims and prompt corporate defendants to pay dearly to settle such claims."[2] It may be fair to assume that he shares with Scalia a concern that the class action mechanism may be abused. In addition, the fact that Gorsuch never served on a district court might suggest a preference for the kind of "bright line" rules embraced by Scalia rather than the more deferential, fact-based approach found in *Tyson Foods*. For the most part, however, this is one area in which Gorsuch's record provides few clues.

1. See, e.g., *Harnish v. Widener Univ. Sch. of Law*, 833 F.3d 298 (3d Cir. 2016); *Roach v. T.L. Cannon*, 778 F.3d 401 (2d Cir. 2015); *In Re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015); *Butler v. Sears, Roebuck and Co.*, 727 F.3d 796 (7th Cir. 2013).

2. See Neil M. Gorsuch & Paul B. Matey, "Settlements in Securities Fraud Class Actions: Improving Investor Protection," Washington Legal Foundation: Critical Legal Issues Working Paper Series (April 2005), www.wlf.org/upload/0405WPGorsuch.pdf; see also Neil M. Gorsuch & Paul B. Matey, "No Loss, No Gain: The Supreme Court Should Make Clear That Securities Fraud Claims Can't Dodge the Element of Causation," Legal Times (Jan. 31, 2005), www.nationallawjournal.com/id=900005422578/No-Loss-No-Gain.